Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (*WEB IV*)

Docket No. 14-CRB-0001-WR
(2016–2010)

LICENSEE SERVICES' REPLY IN SUPPORT OF THEIR MOTION FOR EXPEDITED ISSUANCE OF SUBPOENAS TO: BEATS MUSIC, LLC; RHAPSODY INTERNATIONAL INC.; AND NOKIA CORPORATION

For the first time in his corrected written rebuttal testimony, Professor Rubinfeld asserted that Beats,[1] Spotify, Rhapsody, and MixRadio (formerly Nokia MixRadio) are "non-interactive and/or ad-supported services." Rubinfeld CWRT ¶ 178. The Services moved to strike that new testimony, and the Judges denied that motion without prejudice. The Services then moved for the issuance of subpoenas to Beats, Spotify, Rhapsody, and Nokia in order to create a "comprehensive record" regarding these services and their licenses.

Rhapsody and Nokia do not oppose the motion. The Services have reached an agreement with Spotify and accordingly have withdrawn the motion as to Spotify. Only SoundExchange and Beats – a subsidiary of Apple – ask the Judges to deny the Services' motion, and they do so primarily on the grounds that the request was made during the rebuttal rather than the direct phase of this proceeding. But any alleged "delay" in seeking these subpoenas is entirely attributable to SoundExchange's belated decision to reclassify these four services as non-

[1] Unless otherwise noted, all terms in this Reply are as defined in the Licensee Services' Motion for Expedited Issuance of Subpoenas to: Beats Music, LLC; Spotify USA Inc.; Rhapsody International Inc.; and Nokia Corporation.

interactive services. SoundExchange's change of course, along with Professor Rubinfeld's ambiguity about the functionality offered by the Subpoenaed Services, thereby "interfere[d] with the Judges' need for a comprehensive record that contains . . . a full written explanation by licensors *and* licensees." April 2, 2015 Order Denying Motion to Strike at 11 ("April 2 Order") (emphasis in original). The instant motion is designed to create such a record.

Neither SoundExchange nor Beats disputes that the subpoenas meet the statutory standards for issuing a third-party subpoena. Nor can they: as the Judges found in their April 10, 2015 Order granting in part the Services' motion for issuance of a subpoena to Apple, the information sought from the Subpoenaed Services is both central to this proceeding and unlikely to be presented to the Judges otherwise. As was true of the purported Apple benchmark, information about the Subpoenaed Services' functionality and expectations are critical to the Judges' inquiry into the parties' reservation prices and willingness to pay. April 10, 2015 Order Granting in Part License Services' Mot. for Expedited Issuance of Subpoenas to Apple, Inc. at 6 ("April 10 Order").

Beats also contends (at 5-6) that the requested subpoenas are unduly burdensome.[2] But just as the Judges concluded in their April 10 Order regarding Apple, the scope of the requested subpoenas – which are narrower than those directed at Apple – is commensurate with the Judges' statutory task. April 10 Order at 7. Beats generally asserts (at 6) that the requested subpoena is unduly burdensome because compliance would require collection and processing of "an untold number of" documents, as well as review of those documents for relevance and privilege. They further assert that "many of" the Beats employees have left the company. Beats neither explains which requests it claims are too broad nor provides even a single example of categories or

[2] Beats claims (at 3) that it formally withdrew as a participant in "late 2014." The Services have no record of being served with such withdrawal, and Beats notably fails to specify the date on which its withdrawal occurred.

sources of documents that would be "unduly burdensome" to collect. Such generic and conclusory claims of burden are insufficient given the reliance that SoundExchange has placed on the Subpoenaed Services' agreements as benchmarks and given the Judges' April 2 Order requesting a more "comprehensive record" on which to evaluate these purported benchmarks.

Beats next asserts (at 6) that the information requested is "available from a participant." But the Judges rejected that very argument in their April 10 Order, recognizing that, while SoundExchange "could easily provide actual accountings," it could not "provide the measure of the bargain to [the Subpoenaed Services] at the time [they] executed the Agreements." *Id.*

The requested subpoenas are targeted to determine how the Subpoenaed Services valued or projected the additional, non-DMCA-compliant functionality that they offer. They are therefore necessary to provide the Judges with a fuller picture of whether the relevant agreements are appropriate benchmarks in this proceeding. The subpoenas are also necessary to understand the licensees' expectations of their rights and benefits when the agreements were signed. For those reasons, the requested subpoenas are appropriate because "the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony." 17 U.S.C. § 803(b)(6)(C)(ix); *see also* 37 C.F.R. § 351.9(e).

CONCLUSION

For the foregoing reasons, the Judges should grant the Services' motion and issue the requested subpoenas.

Dated: April 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin J. Miller, hereby certify that a copy of the foregoing version of the Licensee Services' Reply in Support of Their Motion for Expedited Issuance of Subpoenas To: Beats Music, LLC; Rhapsody International Inc.; and Nokia Corporation has been served on this 17th day of April 2015 on the following persons:

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